INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR CALAMARO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, which had adjudged petitioner guilty of failure to pay the occupational tax on wagering.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (App., *infra*, pp. 11-18) have not yet been reported. The opinion of the District Court (R. 53-60) is reported at 137 F. Supp. 816.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1956 (App., *infra*, p. 18). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a numbers "pick-up man" is required to pay the special occupational tax imposed by the Internal Revenue Code, 1939, Section 3290.

STATUTE INVOLVED

The Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.), Sections 3285 (a) and (d), 3290 and 3294 (a) provide:

§ 3285. *Tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

* * * * *

(d) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

§ 3290. *Tax.*

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter

A or who is engaged in receiving wagers for or on behalf of any person so liable.

§ 3294. *Penalties.*

(a) *Failure to pay tax.*

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

STATEMENT

Respondent was apprehended by officers of the Philadelphia police department on October 10, 1952 (R. 7). He had in his possession the following paraphernalia of a numbers lottery, as described by the officers: "40 yellow banker slips containing 1200 straight lottery bets and eight sheets of paper containing 600 number straight lottery bets, a total of 1800 number lottery bets" (R. 9, 21). One of the officers, experienced in the numbers type of lottery, testified that in that type of operation the money for a wager is paid by the player to a "writer", who records the wager in triplicate, retaining the white copy for his own record, furnishing the tissue copy to the numbers player, and delivering the yellow copy to the "pick-up man." The pick-up man delivers the yellow copy to the "banker." If the player has the winning number, the banker delivers the required amount to the writer, who in turn pays off the player. (R. 15-16.)

Respondent admitted to the officers that he had been a pick-up man for three months at a salary of $40 per week (R. 13, 21). On October 29, 1952, respondent pleaded guilty in the Court of Quarter Sessions, County

of Philadelphia, to setting up a lottery and was fined $200 and costs (R. 24-29). Upon an information filed in the United States District Court charging respondent with accepting wagers without having paid the special tax imposed by § 3290 of the Internal Revenue Code (R. 3), and upon trial before a jury, respondent was found guilty (R. 51), and fined $1,000 (R. 61).

Respondent moved for acquittal, contending, *inter alia*, that a pick-up man is not a person "engaged in receiving wagers" for the banker (§ 3290, *supra*, pp. 2-3) (R. 55). The trial judge rejected the contention, relying upon the decision of the Fifth Circuit in *Sagonias* v. *United States*, 223 F. 2d 146 (R. 56), and stating (R. 55):

> * * * The numbers writers, of course, actually contacted the customers, took their money and assisted more directly in the making of the bets, but they were no more receiving wagers than was defendant, because they were all working not for themselves, but for their principal and it was the principal in fact who was making the wagers. Both the pick-up men and the numbers writers were assisting in the making and receiving of wagers and therefore all of them were "engaged in receiving wagers for or on behalf of" the numbers bank.

The Court of Appeals reversed. The majority of the court (Hastie and Kalodner, JJ.) specifically recognized that its holding was in conflict with the Fifth Circuit's *Sagonias* decision, but reasoned that the pick-up man receives no wager, but only a record of a wager. Judge McLaughlin dissented from the majority's "attempted delicate distinction" as "ignor[ing] the realities of the case." He held, further, that respondent

was not only "engaged in receiving wagers," but was also "engaged in the business of accepting wagers" under the statute.

REASONS FOR GRANTING THE WRIT

1. Admittedly, the decision below is in direct conflict with the Fifth Circuit's decision in the case of *Sagonias* v. *United States,* 223 F. 2d 146, in which this Court denied certiorari. 350 U. S. 840. It also conflicts in principle with *Daley* v. *United States,* 231 F. 2d 123 (C. A. 1), certiorari denied, 351 U. S. 964, where the defendants, who were arrested in a raid on the headquarters of a gambling business engaged in accepting bets on horse and dog races and numbers pools, were charged with failure to register and to pay the special tax as (paraphrasing the language of § 3285(d), *supra,* p. 2) persons engaged "in the business of accepting wagers and of conducting a lottery and of conducting a wagering pool."[1] In holding that the evidence warranted the jury's finding that each defendant, individually, was engaged in the described business, the First Circuit approved the trial judge's charge that to be "engaged in the business of conducting a wagering pool or a lottery, a person does not have to personally receive money or a number pool or lottery bet from a bettor; if he is an active participant knowingly in an essential part of the management structure in the processing of such wagering pool or lottery bets in an existing wagering or lottery business, whether top manager, agent solicitor on the street, or an employee or associate of a communications center or central bookkeeping agency

[1] In the case at bar, it was simply charged that respondent was a person liable for the special occupational tax imposed by § 3290, *supra,* pp. 2-3, and that he "did accept wagers" without having paid the tax (R. 3).

of an organization which was engaged in accepting wagers, or conducting a wagering pool or a lottery, he is engaged in such business" (231 F. 2d at 128). On this theory, which the dissenting judge below thought was applicable here, respondent is guilty on the evidence as one who was himself "engaged in the business of accepting wagers" (§ 3285(d)), within the terms of the information.

2. The distinction drawn by the court below between receipt of a wager and receipt of the record of a wager is, we submit, a refinement unwarranted by either the literal language or the purpose of the statute. Moreover, this interpretation, which narrowly looks only to the last part of § 3290 covering those "engaged in receiving wagers for or on behalf of any person" liable for the special tax, ignores the broad terms of § 3285(d) and therefore unduly restricts the just-quoted agency language of § 3290 which refers to and incorporates the provisions of § 3285(d). The provision of § 3290 for taxing persons "engaged in receiving wagers for or on behalf of" another "person who is engaged in the business of accepting wagers" or "who conducts any wagering pool or lottery" (§ 3285(d)) clearly contemplates the taxing of persons acting as agents for the banker in the conduct of such business. In ordinary parlance, and in the context of this statute, the word "wager" is not used in the sense of the contract alone—the intangible meeting of the minds—but connotes as well the written record of the wager (the numbers slip) which is made by the writer and conveyed to the banker by the pick-up man.[2] True, the writer "receives" the

[2] See the officers' reference at R. 9, 21, to the slips as "containing" the "bets."

wager from the player in the sense that he accepts it, thus binding the principal in a contract. But the writer's activities in his contacts with the players and in making records of the wagers are, as shown by the record, merely routine activities in bringing the banker and the players together. Equally essential in the conduct of the business are the pick-up men who bring to the banker the slips—the wagers, the bets—written by the writers. All these activities are integrated steps in conducting the lottery; all the participants work, not for themselves, but for the banker who is the principal of all of them in making the wagers; each step is essential in the banker's ultimate receipt of the wagers.

Under the distinction made by the court below, liability for the special tax would turn upon a wholly irrelevant fact—of two persons, both necessary to the gambling operation and equally engaged in it, only the first in point of time deals with the player, while the second does not deal with him, but only with the writer and the banker. But it is of no moment that two agents happen to intervene between the player and the banker. There is no inherent obstacle to having more than one person "receive" the wager "for or on behalf of" the banker; the statute does not refer to taking wagers from the bettors but to receiving them on behalf of the banker. The writer "receives" the wager from the player, but the pick-up man as truly "receives" the wager—the numbers slip—this time from the writer, but clearly "on behalf of" the banker. That is sufficient under the statute.

3. The Treasury Department's regulation has, since the enactment of the legislation, provided the compelling weight of a contemporary administrative inter-

pretation. The regulation, which was issued on the effective date of the statute,[3] spells out a detailed example of a typical numbers operation, clearly referring both to the writer taking wagers directly from the players and the employee who collects the slips from the writer. The regulation specifically includes the latter pick-up employee among those liable for the special tax. 26 C.F.R. (1956 Supp.) 325.41.[4]

Significant as well is the fact that in the general revision of the Internal Revenue Code, in 1954, Congress reenacted without change the provisions involved here (I.R.C., 1954, §§ 4401(c), 4411). As the Fifth Circuit said in the *Sagonias* case, *supra*, "Certainly, we cannot assume that the Congress was ignorant of that interpretation [of the Treasury Department]; on the contrary, we must presume that reenactment of the same wording was deliberate and with full knowledge of the published regulation" (223 F. 2d at 148). Cf. *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Commissioner* v. *Flowers*, 326 U.S. 465, 469; *Helvering* v. *Griffiths*, 318 U.S. 371, 395.

The committee reports on the original bill likewise manifest the purpose of Congress to reach, through the special tax and registration provisions, all persons who participate in the steps involved in consummating

---

[3] The effective date of the statute was November 1, 1951 (65 Stat. 531). The regulation was issued on the same date (16 F.R. 11211, 11218).

[4] "B operates a numbers game. He has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs a person to collect from his agents the wagers received on his behalf.

"B, his ten agents, *and the employee who collects the wagers* received on his behalf are each liable for the special tax." [Emphasis added.]

wagering transactions. The reports observe that "Persons who receive bets for principals are sometimes known as 'bookmakers' agents' or as 'runners' ", and state in substantially identical language (H. Rep. No. 586, 82d Cong., 1st sess., p. 60; S. Rep. No. 781, 82d Cong., 1st sess., p. 118 (1951)):

> The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the *tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved.* For this reason, the bill(s) provide(s) that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers. [Emphasis added].

The "tracing" of numbers bets through "the various steps involved" includes the activities of pick-up men.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

OSCAR H. DAVIS,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
ROBERT S. ERDAHL,
J. F. BISHOP,
Attorneys.

AUGUST 1956.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,846

UNITED STATES OF AMERICA

v.

VICTOR CALAMARO, APPELLANT

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued May 24, 1956

Before McLAUGHLIN, KALODNER and HASTIE, Circuit Judges

OPINION OF THE COURT—Filed July 11, 1956

By HASTIE, *Circuit Judge:*

The special occupational tax, recently imposed on gamblers by Section 471 (a) of the Revenue Act of 1951, 65 Stat. 531, and the attendant criminal sanctions are bringing bizarre problems to the national courts. Witness the present appeal, which turns on a question of job classification in the so-called numbers racket.

The legislative scheme makes a person, who engages in a type of gambling activity which is taxable under Section 3290 of Title 26 of the United States Code without having paid the tax, guilty of a crime under Section 3294 (a) of that Title. Such a conviction has led to this appeal.

The first question presented is whether the district court erred in not directing an acquittal on the ground

that the proved conduct of the accused did not make him liable to the gambler's tax. In terms, Section 3290 imposes a special occupational tax not only on the entrepreneur "who is engaged in the business of accepting wagers" but also on one "who is engaged in receiving wagers for" such an entrepreneur.

The evidence revealed appellant Calamaro as a very minor functionary in the conduct of that illegal type of lottery called the numbers game. It is conceded that he is not "engaged in the business of accepting wagers" within the meaning of the statute.[1] But the court below thought Calamaro's activity, as proved, amounted to "receiving wagers" within the meaning of Section 3290. Whether that conclusion is correct must be decided in the light of what the record shows about the organization of this illegal business and the specific role played by appellant.

From the evidence we learn that an operating center for numbers play is called a "bank". Each day the written notations of the many "plays", showing how

---

[1] The correctness of this concession is indicated by the legislative history of the statute. Both Senate and House Reports on the bill state such a limitation on the concept of engaging in the business of accepting wagers.

> "A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The 'principals' in such transactions are commonly referred to as 'bookmakers', . . ." H. R. REP. No. 586, 1951, 82d Cong., 1st Sess. 1783, 1839; S. REP. No. 781, *Id.* 1969, 2091.

This restrictive concept has been recognized and applied by the Court of Appeals for the Fourth Circuit in *Sagonias v. United States*, 1955, 223 F.2d 146. On the other hand a general instruction, part of which seems to disregard this concept, was approved by the Court of Appeals for the First Circuit in *Daley v. United States*, 1956, 231 F.2d 123. However, that case did not involve pick-up men or operatives in any analogous situation and it does not appear that the legislative history was brought to the court's attention.

much each bettor has wagered and upon what number or numbers, are channeled into the bank for recordation and appropriate action. In due season the bank also disburses sums won by the relatively few bettors upon whose illegal chance-taking fortune has smiled. But neither in placing his wager nor in collecting, if he wins, does the bettor visit the "bank" or establish direct contact with the headquarters operation. Rather, he places his wager with one of many scattered field operatives called "writers". We are told that the "writing" procedure is standardized in that the "writer" records each wager in triplicate on standard slips; one for the bettor, a duplicate to be retained by the writer, and a third or action copy, identified by its yellow color, for the bank.

But the writer does not come into personal contact with the bank any more than does the bettor. The "numbers banker", even as bankers and brokers in reputable commerce, employs salaried runners and messengers. These couriers are called "pick-up men." It is the duty of a pick-up man to make a daily round of writers, collect yellow slips from them and carry these items to the bank.

Calamaro was a salaried pick-up man. He was intercepted, apparently inbound on his appointed round, by an alert police officer an found to have on his person tell-tale numbers paraphernalia; to wit, notations of bets recorded on yellow slips, such as already have been described. His conduct became a matter of concern to the federal authorities upon discovery that he was going about his illegal work without having rendered unto Caesar any Section 3290 tribute. Whether that section applied to him as a pick-up man, is the present issue.

In normal usage of familiar language, "receiving wagers" is what someone on the "banking" side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides of a single coin. You can't have one without the other.[2] Before the pick-up man enters the picture, in such a case as we have here, the wager has been received physically by the writer and, in legal contemplation, by the writer's principal as well. The government recognizes—and in an appropriate case no doubt would insist—that what the writer does in relation to the bettor amounts to "receiving a wager." Thus, the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits.

Recognizing this analytical difficulty, the government argues in generality that all who participate on the banking side of the numbers game may be viewed as receiving wagers. But this is an enlargement of the meaning of ordinary language used by Congress beyond ordinary usage and understanding. Certainly, such enlargement is not justified when the matter in issue is the scope of a statutory duty, compliance with which is enforced by a criminal sanction.

In reaching this conclusion we are aware that we are

---

[2] Among the definitions in the statute, one which is significant here defines "wager" as "any wager placed in a lottery conducted for profit." 26 STAT. § 3285(b)(1)(C).

disagreeing with the United States Court of Appeals for the Fifth Circuit which, in *Sagonias v. United States*, 1955, 223 F.2d 146, upheld the conviction of a pick-up man in a case indistinguishable from this one. Three sentences in the *Sagonias* opinion state its rationale:

> ". . . [T]he primary purpose of the statute as a whole was to produce revenue by subjecting commercialized gambling to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation." 223 F.2d at pp. 147-8.

If we assume that this judicial view of general statutory purpose is correct, to us it still does not seem to follow that language which on its face merely imposes a tax on two categories of gambling personnel can properly be read as implying that all other categories of gambling personnel are also taxable. *Ejusdem generis* may be appropriate enough as a rule of limitation in construing a conjunctive coupling of specifics with a generality. But we can see no warrant for an enlargement of meaning *ejusdem generis* in a case like this where the legislature has used no general language to suggest that it was attempting to extend the tax beyond the enumerated categories of acceptors and receivers.

Finally, the *Sagonias* opinion also cites, as a make-weight, a statement in Section 325.41 of Regulation 132 promulgated November 3, 1951 by the Treasury Department. There the Department lists some examples of types of employment which in its view obligate the worker to pay this tax. One example is employment by an operator of a numbers game "to collect from his agents the wagers received on his behalf." But we think the statutory statement of taxable categories is not ambiguous and not comprehensive enough on its face to make the situation of a pick-up man an apt example of its coverage. To accept the Treasury view would be to add to the statute something which simply is not there.

We conclude that the district court should have granted appellant's motion for acquittal. We have not considered any of appellant's objections to other rulings of the trial court.

The judgment will be reversed.

McLAUGHLIN, *Circuit Judge,* dissenting.

In its attempted delicate distinction which carefully removes appellant from the reach of the tax and, in effect, emasculates the statute, the majority ignores the realities of the case.

Admittedly appellant receives the ticket identifying the particular wager from which, according to the testimony, after the winning number has "come out" the bank determines whether it is obligated to pay that particular ticket. What more is needed to "receive a wager" does not appear from the court's decision. Further, instead of appellant being an inconsequential messenger, he is a direct representative of the

"banker", a man from headquarters. Appellant stems directly from the "banker" to the "writers", an indispensable link in the day to day functioning of this vicious operation. With his class now exonerated everyone connected with "numbers" anywhere, if put to it, should have little difficulty avoiding the impact of Section 3290 by simply asserting that he is merely a "pick-up" man.

From the facts, appellant is a necessary and important participant in the ugly corroding racket involved. Not only is he subject to that part of the law imposing liability on those persons "engaged in receiving wagers" (Sagonias v. United States, 223 F.2d 146 (5 Cir. 1955)) but he also comes directly under it as one "engaged in the business of accepting wagers". That is the clear holding of Daley v. United States, 231 F.2d 123, 128 (1 Cir. March 30, 1956). There, the court specifically affirmed that portion of the trial judge's charge which stated that,

> "* * * to be 'engaged in the business of conducting a wagering pool or a lottery, a person does not have to personally receive money or a number pool or lottery bet from a bettor; if he is an active participant knowingly in an essential part of the management structure in the processing of such wagering pool or lottery bets in an existing wagering or lottery business, whether top manager, agent solicitor on the street, or an employee or associate of a communications center or central bookkeeping agency of an organization which was engaged in accepting wagers, or conducting a wagering pool or a lottery, he is engaged in such business.'"

There are no reported decisions in accord with the majority view. I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,846

UNITED STATES OF AMERICA

vs.

VICTOR CALAMARO, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: MCLAUGHLIN, KALODNER and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:

IDA O. CRESKOFF,
Clerk.

July 11, 1956.

Received & Filed July 11, 1956.

IDA O. CRESKOFF,
Clerk.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956 994811 118